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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 171

THE UNITED STATES OF AMERICA, PETITIONER

vs.

OKLAHOMA GAS & ELECTRIC COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE TENTH CIRCUIT**

**PETITION FOR CERTIORARI FILED JUNE 23, 1942
CERTIORARI GRANTED OCTOBER 12, 1942**

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A [Caption omitted.]

1 In United States Circuit Court of Appeals for the Tenth
Circuit

No. 2390

UNITED STATES OF AMERICA, APPELLANT
vs.

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION, APPELLEE

*Statements of points upon which appellant intends to rely on
appeal, and designation of parts of the record necessary for the
consideration thereof*

Filed September 29, 1941

The appellant, the United States of America, for its statement of the points upon which it intends to rely upon appeal, adopts its statement of such points set forth and contained in the original transcript of the record of the above entitled cause as certified by the Clerk of the United States District Court, and now on file in the office of the Clerk of the above entitled court.

Appellant designates the entire certified record as being necessary for the consideration of its said points, and asks that the certified record, together with this statement and designation, be printed in its entirety.

Geo. H. McElroy,
Assistant United States Attorney,
Attorney for Appellant.

Service is hereby acknowledged of the above Statements of Points Upon Which Appellant Intends to Rely on Appeal, and Designation of the Parts of the Record Necessary for the Consideration Thereof, this 26th day of September 1941.

RAINEY, FLYNN, GREEN & ANDERSON,
B. M. RAINEY, JR.,
Attorneys for Appellee.

[File endorsement omitted.]

In District Court of the United States for the Western
District of Oklahoma

No. 489—Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION, DEFENDANT

Complaint

Filed June 18, 1940

Comes now the plaintiff, the United States of America, and for cause of action against the defendant Oklahoma Gas & Electric Company, a corporation, alleges and states:

1. That the United States of America is the owner of the following described real estate, situated in the Western District of Oklahoma, to wit:

The North Half ($N\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-one (31), Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma,

and at all times herein mentioned has held and now holds the title thereto in trust for She-pah-tho-quah, Mexican Kickapoo Indian Allottee No. 193 or for her heirs, as hereinafter more fully alleged.

2. That the Oklahoma Gas and Electric Company is a corporation, organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal place of business at Oklahoma City, Oklahoma.

3. That this is a suit of a civil nature arising under the laws of the United States and is a case of actual controversy; that plaintiff by this complaint seeks a declaratory judgment pursuant to Section 274 (a) of the Judicial Code as amended (U. S. C. A. Title 28, Section 400) and a mandatory injunction.

4. Plaintiff alleges that heretofore there was deposited in the General Land Office of the United States a schedule of allotments of land dated June 18, 1894, from the Acting Commissioner of Indian Affairs, approved by the Acting Secretary of the Interior on September 12, 1894, in conformity with the agreement with the Kickapoo Indians in Oklahoma Territory, ratified and confirmed by the Act of Congress approved March 3, 1893, whereby She-pah-tho-quah was allotted the following described land, to wit:

The North Half (N $\frac{1}{2}$) of the Northeast Quarter (NE $\frac{1}{4}$) of Section Thirty-one (31), Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma;

That on the 6th day of October, 1894, a trust patent was issued to said allottee for said lands, containing the provision, under the laws then in force, that the United States of America did and would hold the land thus allotted to said She-pah-tho-quah (subject to all restrictions and conditions contained in the Fifth Section of the Act of Congress of February 8, 1887) in trust for said allottee for a period of twenty-five years, or in case of her decease, for the sole use of her heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said trust period the United States would convey said land by patent in fee to said Indian or her heirs, discharged of said trust and free of all charges and encumbrances, provided that the President of the United States might in his discretion extend such trust period. A copy of said trust patent is hereto attached, marked Exhibit "A" and made a part hereof.

Thereafter and on February 27, 1912, Woodrow Wilson, then President of the United States by executive order extended the trust period on allotments made to Mexican Kickapoo Indians in Oklahoma which would expire during the calendar year

4 1919, for a period of five years, a copy of which executive order is hereto attached, marked Exhibit B and made a part hereof. On June 19, 1924, Calvin Coolidge by executive order further extended said trust period for a period of ten years, and on December 15, 1933, Franklin D. Roosevelt by executive order further extended said trust period for the term of ten years from the date on which said trust would otherwise expire. Copies of said last two mentioned executive orders are hereto attached, marked Exhibits C and D, respectively, and made a part of this complaint.

5. That said She-pah-tho-quah departed this life on the 28th day of July 28, 1911, and on the 30th day of March 1912, in heirship proceedings involving her estate, duly approved by the Secretary of the Interior, the following-named persons were determined to be the sole heirs of She-pah-tho-quah, deceased, and to inherit the land above described, in accordance with the laws of the state of Oklahoma, to the shares set opposite their names:

Wah-pe-pah, surviving husband, 1/3

Mah-che-me-she-kah, surviving child 2/9;

Na-o-toke, surviving child, 2/9;

Ke-ah-tam-oke, surviving child, 2/9;

6. That said Wah-pe-pah departed this life, intestate, on October 4, 1935, and on June 10, 1936, in an order determining heirs duly

made and entered by the Secretary of the Interior, the following-named persons were determined to be the sole heirs of Wah-pe-pah, deceased, and to inherit the one-third interest of Wah-pe-pah in the land above described in the shares set opposite their names, to wit:

Mah-squa-ke, surviving widow, 1/5;

Pa-ko-to-mo-quah, surviving daughter, 1/5;

Frank Wapepah (Mah-che-me-she-kah) surviving son, 1/5;

James Wahpepah (Na-o-toke) surviving son 1/5;

Fred Wahpepah (Ke-ah-ta-moke) surviving son 1/5;

7. That the land hereinabove described by reason of said heirship proceedings and the executive orders extending said trust period, as above alleged, is now held in trust for the following-named persons in the shares set opposite their names, to wit:

5 Mah-squa-ke, 1/5 of 1/3 or 3/45

Pa-ko-to-mo-quah, 1/5 of 1/3 or 3/45

Frank Wapepah (Mah-she-me-she-kah) 2/9 plus 3/45 or 13/45

James Wapepah (Na-o-toke) 2/9 plus 3/45 or 13/45

Fred Wahpepah (Ke-ah-to-moke) 2/9 plus 1/3 or 13/45

8. That on or about the 15th day of October, 1936, the defendant Oklahoma Gas and Electric Company, a corporation, erected its transmission line for the transmission of electric current, and placed upon said land eight poles for the carrying of its electrical wires across a portion of said land hereinabove described, but more particularly described as follows:

Beginning at the NW Corner of said N/2 NE/4 thence south along the west line of said N/2 NE/4 a distance of 40 feet thence southeasterly on a curve to the right having a radius of 1106.3 feet a distance of 573 feet thence S 56° 56' E a distance of 2004.3 feet to a point on the south line of said N/2 NE/4 thence east along said south line a distance of 150 feet thence S 50° 56' W, a distance of 2139.3 feet a distance of 360 feet to a point on the north line of said N/2 NE/4 thence west along said north line a distance of 250 feet to point of beginning containing 4.66 acres, more or less, in addition to present right-of-way.

That the erection of said transmission line across said land was done without the consent of the United States of America and was not in compliance with the laws of the United States applicable thereto, and the regulations of the Secretary of the Interior promulgated pursuant to said laws, and that although the defendant corporation has been repeatedly requested to make proper application to the Secretary of the Interior for authority to erect and maintain said power line across the land hereinabove described, the said defendant has wholly failed, neglected and refused to do so.

9. Plaintiff further alleges that by the construction of the above described unauthorized transmission line across the said property, plaintiff has suffered damages in the amount of Forty (\$40.00) Dollars (or eight (8) poles at \$5.00 a pole), which the said defendant has wholly refused to pay.

6 Wherefore, premises considered, plaintiff prays that this court adjudge:

1. That the erection of an electric line for the transmission of power for private, commercial purposes across the above-described land, held in trust by the United States for the heirs of the deceased allottee She-pah-tho-quah, constitutes an unwarranted use and servitude of said property, and that this court declare that said company has no easement over said land, or any interest in said land, and no right or authority to erect a power transmission line thereupon.

2. That a mandatory injunction issue requiring said defendant to remove said poles and lines from said above described property.

3. That plaintiff have judgment herein against the defendant for the sum of Forty (\$40.00) Dollars, for the costs of this action, and for all further proper relief in the premises.

GEO. H. McELROY,

Assistant United States Attorney.

[File endorsement omitted.]

[Exhibits do not appear in typewritten record.]

In United States District Court

Answer

Filed July 6, 1940

Comes now the defendant, Oklahoma Gas and Electric Company, a corporation, and for its answer to the complaint of the plaintiff, The United States of America, filed in this cause, states and alleges:

I

That this defendant is a corporation, duly incorporated under the laws of the State of Oklahoma, and is now and was at all times mentioned in plaintiff's petition manufacturing and furnishing electricity and electrical current to a large number of consumers thereof in the State of Oklahoma as a public utility, including cities and towns, communities and other municipal subdivisions of the State of Oklahoma, and private individuals

and corporations within the State of Oklahoma for use of said municipal corporations, communities, private corporations and individuals in lighting streets, buildings and for use of industrial and domestic consumers thereof in such cities and towns and also various state and federal institutions in the state; that on account of the extent and size of its said business in so manufacturing and furnishing such electricity and electrical current, it was and is necessary that this defendant erect, construct and maintain its poles, wires and other electrical equipment upon and over various state highways within the State of Oklahoma; that on or about January 1, 1928, pursuant to application duly filed by the State of Oklahoma, in accordance with the laws of the United States, to open and establish a state highway, the Secretary of the Department of Interior, in consideration of the sum of \$4,275.00 granted to the State of Oklahoma an easement of way for highway purposes eighty feet wide and approximately 2,577 feet long, over and across the following described land:

The North Half (N/2) of the Northeast Quarter (NE/4) of Section Thirty-one (31) Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma,

which said easement is more particularly described as follows:

Beginning at the NW corner of said N/2 NE/4 thence south along the west line of said N/2 NE/4 a distance of 40 feet thence southeasterly on a curve to the right having a radius of 1,106.3 feet a distance of 373 feet thence S 56° 46' E a distance of 2,004.3 feet to a point on the south line of said N/2 NE/4 thence east along said south line a distance of 150 feet thence N 56° 56' W a distance of 2,139.3 feet a distance of 390 feet to a point on the north line of said N/2 NE/4 thence west along said north line a distance of 250 feet to point of beginning containing 4.06 acres, more or less, in addition to present right of way.

That thereafter, pursuant to said grant to the State of Oklahoma of said easement of way by the United States, the State of Oklahoma did construct and establish a state highway, as a part of its State Highway system, over and along the easement last above described.

II

That subsequent thereto, and on to-wit, the 9th day of October 1938, the State Highway Commission of the State of Oklahoma, acting under and by virtue of the laws of said State, granted to this defendant a license and permit to erect, construct, and maintain a system of wires, poles and other electrical equip-

ment over and along the easement of way for highway purposes, which had theretofore been granted to the State of Oklahoma by the United States of America as above referred to; a copy of said license being marked "Exhibit A," is hereto attached and made a part hereof; that thereafter, pursuant to said license and permit granted to it by the State of Oklahoma, this defendant on or about the 15th day of October 1900, erected its rural service line for supplying electrical current to farmers living adjacent to said highway, and placed upon said above described lands within the confines of the above referred to easement for highway purposes, eight (8) poles for the carrying of its electrical wires; that the erection of said transmission line across said land and along said highway easement was done with the consent and permission of the State Highway Commission of the State of Oklahoma, and pursuant to the laws of the State of Oklahoma; that the construction and maintenance of said poles and wires along said highway by this defendant was and is a proper use of said highway as such.

III

That defendant denies that the United States of America has any jurisdiction, authority or control over the easement of way above referred to as having been granted to the State of Oklahoma for highway purposes and denies that the United States of America or the regulations of the Secretary of Interior promulgated pursuant to the laws of the United States have any application to this defendant in the erection of its poles and wires and maintenance thereof upon and over a state highway of the State of Oklahoma; that by reason of the foregoing facts defendant alleges it has a complete and perfect right to its said use of the highway as set forth above, and that neither the United States or the Indians represented by the United States, referred to in plaintiff's bill of complaint, have any right or authority over said easement or to any compensation from this defendant by reason of its use of said highway for the purposes set forth above.

Wherefore, having fully answered, defendant prays that the plaintiff take nothing by its bill of complaint and that this defendant go hence with its costs herein expended.

RAINEY, FLYNN, GREEN & ANDERSON,

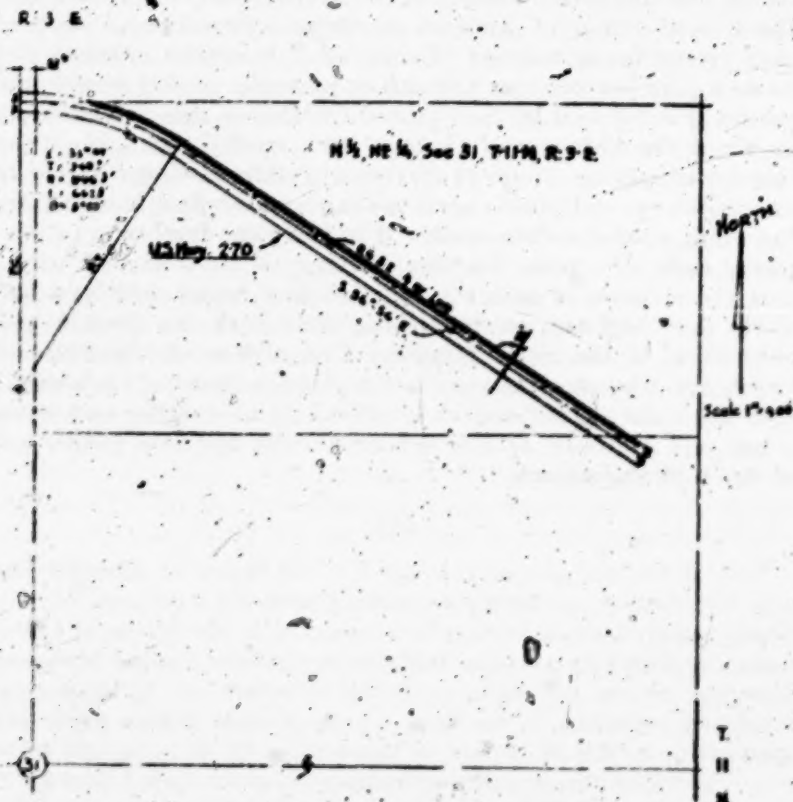
Attorneys for Defendant,

735 First National Building,

Oklahoma City, Oklahoma.

[Verification omitted.]

[File endorsement omitted.]



Pottawatomie County
Oklahoma

In United States District Court

Stipulation of facts

Filed Oct. 4, 1940

It is stipulated and agreed by and between the parties hereto that the following are agreed facts in this case, but that either

party may introduce other evidence not inconsistent with or contradictory to such facts:

I

Pursuant to the Act of March 3, 1893, c. 203, Art IV, 27 Stat. 557, there was allotted to She-pah-tho-quah, a Kickapoo Indian, allottee No. 193, the following described land:

The North Half (N/2) of the Northeast Quarter (NE/4) of Section Thirty-one (31), Township Eleven (11) North, Range Three (3) East of the Indian Meridian in Pottawatomie County, Oklahoma.

A trust patent dated October 6, 1894, was issued to said allottee. Under the terms of the patent the United States holds the allotted land in trust "subject to all the restrictions and conditions contained" in Section 5 of the Act of February 8, 1887, c. 119, 24 Stat. 388, 389, so that it was inalienable for a period of 25 years, or longer, if that period were extended by the President of the United States. By Executive Order of February 27, 1919, and prior to the expiration of the 25-year period of restriction, the period of restriction against alienation was extended five years; by Executive Order of June 19, 1924, and prior to the expiration of extended period of restriction, the period of restriction against alienation was extended 10 years; by Executive Order of December 15, 1933, and prior to the expiration of the extended period of restrictions, the period of restriction against alienation was extended 10 years to October 6, 1943.

On July 28, 1911 the allottee died; that said land is now held in trust by the United States for the following named heirs of the allottee in the shares set opposite their names:

Mah-squa-ko, $1/5$ of $1/3$, or $3/45$

Pa-ko-to-mo-quah, $1/5$ of $1/3$ or $3/45$

Frank Wapepah (Mah-she-me-she-kah), $2/9$ plus $3/45$ or $13/45$

James Wapepah (Na-o-toke), $2/9$ plus $3/45$ or $13/45$

Fred Wah-epah (Ke-ah-ta-moke), $2/9$ plus $1/5$ or $13/45$

That the Oklahoma Gas and Electric Company is and was at all times mentioned herein, an operating public utility company, incorporated under the laws of Oklahoma, and engaged in the production, transmission, distribution and sale of electricity in the States of Oklahoma and Arkansas; that said company has been continuously engaged in this business since 1902 in Oklahoma and since 1928 in Arkansas; that the territory served by

the Oklahoma Gas and Electric Company extends through the central part of the State of Oklahoma from the Kansas border on the North, to Texas on the South, and throughout the central part of the state from West to East and it also includes six (6) counties in Western Arkansas; that retail electric service is supplied in 222 communities and contiguous rural and suburban territory; that the company furnishes at wholesale for resale, the entire electric energy requirements of 15 additional communities; that of the total communities served 214 are located in Oklahoma and 23 are located in Western Arkansas; that the estimated aggregate population of the territory served, both retail and wholesale, based on the 1930 federal census, is over 590,000; that the Oklahoma Gas and Electric Company furnishes electric service to various industries, both within and without the above communities served by it, among which said industries are flour mills, grain elevators, oil refineries, cotton mills, cotton gins, stock yards, packing plants, creameries and dairy product plants, glass factories, brick and tile factories, building material plants, furniture factories, machine shops, coal mines, ice plants, railroad shops, and the Oklahoma Railway Company; that in addition thereto said company has constructed and is operating approximately 2,500 miles of rural electric line, furnishing electric service to farms, dairies, and for other agricultural purposes, along and adjacent to public highways within said states.

That on account of the extent and magnitude of its business in so manufacturing and furnishing electricity and electrical current and in order to carry on its business, the defendant has erected, constructed and maintained its poles, wires and other electrical equipment upon and over various state highways within the State of Oklahoma.

III

On July 9, 1926 the State of Oklahoma, through its Highway Commission, applied to the Secretary of the Interior of the United States, petitioning him "to grant permission in accordance with section 4 of the act of March 3, 1901 (31 States L., 1058, 1084), to open and establish a public highway" across the land described in paragraph No. 1 hereof. The course of the highway was described as follows:

Beginning at the NW corner of said N/2 NE/4 thence South along the West Line of said N/2 NE/4 a distance of 40 feet thence Southeasterly on a curve to the right having a radius of 1,106.3 feet a distance of 573 feet thence S. 56°56' E. a distance of 2,004.3 feet to a point on the South line of said N/2 NE/4 thence East along

said South line a distance of 150 feet thence N. $56^{\circ}50'$ W. a distance of 2,139.3 feet a distance of 360 feet to a point on the North line of said N/2 NE/4 thence West along said North line a distance of 250 feet to point of beginning containing 4.55 acres, more or less, in addition to present right of way.

That said application was duly considered by the said Interior Department. and on June 1, 1927, a claim was filed by the United States on behalf of the heirs of She-pah-tho-quah in the sum of \$1,275.00, as compensation to said heirs for the establishment of said highway across their allotment; that said sum of \$1,275.00 was paid by the State of Oklahoma. On January 20, 1928, the Assistant Secretary of the Interior endorsed the following approval on the map of definite location accompanying the application of the State of Oklahoma:

"DEPARTMENT OF THE INTERIOR,

Jan. 20, 1928.

Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058-1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.

JOHN H. EDWARDS,

Assistant Secretary."

16

IV

That subsequent thereto and on, to-wit, the 9th day of October 1936 the State Highway Commission of the State of Oklahoma, acting under and by virtue of the laws of said state, granted to the defendant, Oklahoma Gas and Electric Company, a license and permit to erect, construct and maintain a system of wires, poles, and other electrical equipment over and along said highway. A copy of said license from the State of Oklahoma to the defendant, Oklahoma Gas and Electric Company, being marked "Exhibit I" is hereto attached and made a part of this stipulation.

V

That thereafter, pursuant to said license and permit granted to it by the State of Oklahoma, the defendant, Oklahoma Gas and Electric Company, on or about the 15th day of October 1936, erected its rural service line for supplying electrical current to farmers living adjacent to the aforesaid public highway and placed upon the above described lands within the confines of the above referred to highway 8 poles for the carrying of its electrical wires; that the erection of said rural service line along said highway was done with the consent and permission of the State Highway Commission of the State of Oklahoma and pursuant to the

laws of the State of Oklahoma, and in accordance with the standards of construction prescribed by the Corporation Commission of the State of Oklahoma.

That said rural line so constructed is a part and parcel of defendant's system of rural electrification, adjacent to and extending from the City of Shawnee, Oklahoma, used in supplying electricity to its customers.

Geo. H. McElroy,

Asst. United States Attorney,

RAINEY, FLYNN, GREEN & ANDERSON,

Attorneys for Defendant.

17

Exhibit I to stipulation of facts

LICENSE

This authority executed in quadruplicate this 9th day of October 1936, by the State Highway Commission, acting for and on behalf of the State of Oklahoma, hereinafter called Commission, witnesseth:

That the Commission does by these presents grant to Oklahoma Gas & Electric Company of Shawnee, Oklahoma, a license to erect, construct and maintain a 4000 volt electric line along, upon or across the hereinafter described state highways for the purpose of transmitting, selling, and using electricity.

Said highways being shown on attached sketch and described as follows, to wit:

Check \$5.00 for inspection and sketch showing location. Beginning at a point where the north property line of highway 270 intersects the east boundary line of the SW $\frac{1}{4}$ Section 32-11N-3E, Pottawatomie County thence in a northwesterly direction along highway 270 through the SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of said Section 32 and the NE $\frac{1}{4}$ of Section 31-11N-3E, thence west along the south side of the SW $\frac{1}{4}$ of Section 30-11N-3E in all a distance of one and three tenths miles.

It is understood that the proposed poles will be placed on a line parallel with and 38 ft. Northeast of the center line of highway No. 270.

This authority includes the right to cross all state highways and state roads intersecting any part of the route above described, and said authority also includes the right to maintain the necessary stubs and guy wires and to trim trees when and where necessary for proper clearance, but trees shall not be removed or trimmed without the written approval of the Commission. Said poles, posts, and stubs are to be erected, or pipe lines

installed, under the direction of the Commission and in the manner and locations as approved by him.

For pole lines at all crossings, a clearance above the surface of not less than twenty (20) feet shall at all times be maintained. That said poles, posts and stubs, pipe lines and all fixtures, wires, etc., shall at all times be kept in good repair.

That this license is revocable at will and upon notice of revocation the licensee herein shall at its own expense immediately remove from said highway (or to such new location thereon as may be designated by the Commission) to the satisfaction of the Commission, all poles, posts, stubs, pipes, valves, fixtures, and other property erected and placed upon or under the hereinbefore described highways under the authority contained herein.

That the licensee assumes all liability for any damage to persons or property caused by the construction or maintenance of said poles, posts, stubs, pipes, valves, wires, and other property placed on or under said highway; and agrees to reimburse the State for any and all monies expended by it in repairing any damage to said highway caused by the construction or maintenance of such transmission lines and pipes.

This license is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property.

Disapproval -----

THE STATE HIGHWAY COMMISSION OF OKLAHOMA,
By VAN T. MOON, *State Highway Engineer.*

Approval Recommended:

Date 10-9-26.

B. E. CLARK,
Division Engineer.

J. F. LARCEY,
Engineer of Right of Way.

19

In United States District Court

Opinion

Filed March 6, 1941

The facts in this case are stipulated.

Prior to July 9, 1926, the State of Oklahoma, through its Highway Commission, applied to the Secretary of the Interior of the United States, petitioning him to grant permission in accordance with Section 4 of the Act of March 3, 1901 (31 Stats. L.,

1058, 1084), to open and establish a public highway across certain land, which had been allotted to She-pah-tho-quah, a Kickapoo Indian, allottee No. 193, described as follows:

"The North Half of the Northeast Quarter of Section 31, Township 11 North, Range 3 East of the Indian Meridian in Pottawatomie County, Oklahoma."

The course of the highway was described as follows:

"Beginning at the NW corner of said N/2 NE/4 thence south along the West line of said N/2 NE/4 a distance of 40 feet thence Southeasterly on a curve to the right having a radius of 1,106.3 feet a distance of 573 feet thence S. 56°56' E. a distance of 2,004.3 feet to a point on the South line of said N/2 NE/4 thence East along said South line a distance of 150 feet thence N. 50°56' W. a distance of 2,139.3 feet a distance of 360 feet to a point on the North line of said N/2 NE/4 thence West along said North line a distance of 250 feet to point of beginning containing 4.66 acres, more or less, in addition to present right of way."

The application was duly considered by the Interior Department, and on June 1, 1927 a claim was filed by the United States on behalf of the heirs of the said allottee in the sum of \$1,275, as compensation to said heirs for the establishment of said highway across their allotment, and said sum of \$1,275 was paid by the State of Oklahoma.

On January 20, 1928, the Assistant Secretary of the Interior endorsed the following approval on the map of definite location accompanying the application of the State of Oklahoma;

20

"DEPARTMENT OF THE INTERIOR,

Jan. 20, 1928.

"Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058-1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.

JOHN H. EDWARDS,

Assistant Secretary."

Subsequent thereto and on the 9th day of October 1936, the State Highway Commission of Oklahoma, acting under and by virtue of the laws of said state, granted to the defendant, Oklahoma Gas & Electric Company, a license and permit to erect, construct, and maintain a system of wires, poles, and other electrical equipment over and along said highway. Said license provided:

"That the Commission does by these presents grant to Oklahoma Gas & Electric Company of Shawnee, Oklahoma, a license to erect, construct and maintain a 4,000 volt electric line along, upon or across the hereinafter described state highways for the purpose of transmitting, selling and using electricity."

"This authority includes the right to cross all state highways and state roads intersecting any part of the route above described, and said authority also includes the right to maintain the necessary stubs and guy wires and to trim trees when and where necessary for proper clearance, but trees shall not be removed or trimmed without the written approval of the Commission. Said poles, posts, and stubs are to be erected, or pipe lines installed, under the direction of the Commission and in the manner and locations as approved by him."

"This license is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property."

It is admitted that the lands through which the highway in question was constructed, were restricted Indian lands.

21 The plaintiff brings this action, seeking a declaratory judgment that the erection of an electric line for the transmission of power for private, commercial purposes across the above described land, held in trust by the United States for the heirs of the deceased allottee, constituted an unwarranted use and servitude of said property, and that this court declare that said company has no easement over said land, and no right or authority to erect a power transmission line thereupon; that a mandatory injunction issue requiring said defendant to remove said poles and lines from said above described property; that the plaintiff have judgment against the defendant for the sum of \$40 (or \$5 a pole for eight poles erected on the above described property), for the costs of this action, and for all further proper relief in the premises.

There being no controversy over the facts, the only question for determination is whether or not the grant to the defendant by the State Highway Commission is sufficient authority for the defendant to erect its poles and transmission lines on said highway without the consent of the owner of the land through which said highway was constructed.

It is the contention of the plaintiff that in executing the grant to the State Highway Commission of Oklahoma to construct a public highway through said Indian allotment, there was at least an implied understanding that said highway would be used only for the purposes of pedestrians and vehicles, or the ordinary uses of a highway, and that the use of said right of way for the purposes of erecting a transmission line constituted an unwarranted use and servitude of said right of way.

It is the contention of the defendant that when the plaintiff, through its authorized agents, granted a right of way for purposes of constructing a state highway, it did so with full knowledge that

the opening and establishment of the highway would be in accordance with the laws of the State of Oklahoma.

The Act of March 3, 1901, c. 832, sec. 4, 31 Stat. 1064, 25 U. S. C. A. sec. 311, provides:

22 "The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation."

The Act of March 4, 1911, c. 238, 36 Stat. 1933, 43 U. S. C. A. sec. 961, provides for the granting of a right of way to individuals or corporations for the erection of electrical poles and lines through Indian reservations. This statute, however, has no application to the present controversy because the defendant did not seek to or erect a line of poles through an Indian reservation other than upon a public highway.

When the government granted the right of way, there were no limitations as to what should constitute the uses of the highway. That was apparently left to the determination of the State of Oklahoma. And the question narrows itself even more to the proposition as to what constitutes legal use of a state highway. Will the legal use be determined by federal law or by state law?

Laws of Oklahoma 1917, c. 230, p. 429, sec. 1, 69 Okl. St. Ann. sec. 4, provides:

"Any person, firm, or corporation organized under the laws of this State, or qualified to do business in this State to furnish light, heat or power by electricity, gas or oil, provided the same shall not apply to interstate pipe lines, shall have the right to use the public roads and highways in this State for the purpose of erecting poles or posts along or across the same, and sustain their wires and fixtures thereon, or to lay under the surface of said roads or highways pipes or conduits for the purpose of selling electricity and gas, or either, for light, heat or power, upon obtaining the consent of the Board of County Commissioners of the county or counties in which the public highways are proposed to be used for such purpose, * * *"

23 This legislative act of the State of Oklahoma was amended by the Laws of 1933, c. 19 p. 31, sec. 6, 69 Okl. St. Ann. sec. 26, which provided for the establishment of the State Highway Commission and granted the said Highway Commission full control and authority over state highways.

The Supreme Court of Oklahoma, in *Nazworthy v. Illinois Oil Co.*, 176 Okl. 87, 54 P. (2d) 642, held, quoting from the syllabus:

"The construction and maintenance of an oil pipe line along and under a state highway, constructed and maintained in the manner authorized and provided by law, is not an additional servitude for which compensation must be paid to the owner of abutting land, or to the owner of the land over which the highway was laid."

In this case the court gives an excellent analysis of the development of highways and of the necessity for present day uses of a state highway, which perhaps were not even in contemplation at the time the highways were originally dedicated, and quotes from the Supreme Court of Kansas in *McCann v. Johnson County Telephone Co.*, 76 P. 870, as follows:

"The purpose of the highway is the controlling factor. It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication. It is a thoroughfare by which people in different places may reach and communicate with each other. The use is not to be measured by the means employed by our ancestors, nor by the conditions which existed when highways were first devised. The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply."

And the court furthermore quotes at length from the Supreme Court of Minnesota in *Cater v. N. W. Tel. Exchange Co.*, 60 Minn. 539, 63 N. W. 111, 28 L.R.A. 310, as follows:

24 "If there is any one fact established in the history of society and the law itself, it is that the mode of exercising this easement is expansive, developing and growing as a civilization advances. In the most primitive state of society, the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and next a way for vehicles drawn by animals—constituting, respectfully, the iter, the actus, and the via of the Romans. And thus the methods of using public highways expanded with the growth of civilization until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved

methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use. * * *

"The conclusion reached is that:

"The construction and maintenance of a telephone line upon a rural highway is not an additional servitude for which compensation must be paid to the owner of the land over which the highway is laid."

The Oklahoma Court concludes its opinion with the following very pertinent statement:

"When the state constructs a modern highway along or through a tract of land privately owned, the result is often in fact a substantial enhancement of the value of the privately owned tract. Notwithstanding that fact, however, the law presumes damage to the tract and the landowner is compensated for the land taken and used, irrespective of any enhancement of the value. After the highway is constructed it is used generally for travel, transportation, and transmission. As new methods of transportation develop they are used upon the highway, whether that use is by bus, truck or oil-pipe line. When the landowner has been compensated for the taking of the highway, it is too difficult to follow a contention that he is additionally damaged by each different, new, or additional use of the highway for travel, transportation, or transmission. We conclude that the use of the highway here under consideration, authorized by specific state statute, enjoyed under specific supervision of the state, is wholly within the primary law of the use of the highway and must be held to be no such additional burden or servitude as would entitle the abutting landowner to additional compensation for such use."

The Nazworthy case was followed by the Supreme Court of Oklahoma in *Stanolind Pipe Line Co. v. Winford*, 176 Okl. 47, 24 P. (2d) 646, and in *Oklmulgee Producers & Manufacturers Gas Co. v. Franks*, 177 Okl. 456, 60 P. (2d) 771.

In *Jafek v. Public Service Co. of Oklahoma*, 183 Okl. 32, 79 P. (2d) 813, the Supreme Court quoted from *Clayborn v. Tennessee Electric Power Co.*, 20 Tenn. App. 574, 101 S. W. (2d) 492, 296, with approval, as follows:

"The highway not only serves the needs of the traveling public, but may also lawfully serve the public by furnishing the public the conveniences afforded by public utility companies."

Whether or not the construction of a telephone or telegraph line upon a public highway constituted an additional servitude of said right of way is determined by local law (*Barney v. Keokuk*, 94 U. S. 324), and has been passed upon by many of the state courts and by three Federal District Courts. The states

of Illinois, Maryland, New Jersey, North Dakota, Ohio, Pennsylvania, and Virginia have held in effect that a telephone or telegraph line is an added burden on a rural highway, entitling an abutting property owner to compensation. The states of Alabama, Kansas, Kentucky, Michigan, Minnesota, Oklahoma, Vermont, and West Virginia have held to the contrary. In the federal courts, *Pacific Postal Tel. Cable Co. v. Irvine*, (Calif.) (1892), 49 F. 113, and *Kester v. Western Union Tel. Co.*, (N. Y.) (1901), 108 F. 926, it was held that the construction of a telegraph line constituted an additional burden upon the fee 26 of a public highway right of way. In a much later case, however, the Circuit Court for the Northern District of Georgia, in 1908, in *Southern Bell Telephone & Telegraph Co. vs. Nalley*, 165 F. 263, held:

"The construction of a telephone line upon a public county road or highway in the state of Georgia, with the approval of the county authorities in charge of such road or highway, which line is used in the transmission of messages between various points, is not an additional burden or servitude upon such public road, and does not exceed the uses to which the easement in the public can be put by the approval of such county authorities, and an abutting landowner has not the legal right to prevent such use." [Quoting from the headnote.]

In a long line of cases dealing with streets, the federal courts have held without exception that the power to control the use of a public street is vested solely in the municipality. In *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, the court held that the original source of power over both streets and highways is the state, but that this power or control is generally delegated in some form to the municipalities and county authorities of the state.

Emphasis is placed by the plaintiff on the concluding paragraph of the license granted to the defendant by the State Highway Commission, which paragraph is as follows:

"This license is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property."

This, however, does not refer to additional burden upon the right of way. The defendant might erect its poles and construct its line in such a way as to interfere with the entrance from the highway to the adjacent property at the customary point, or it might place the line so near to the adjacent property as to damage growing trees or otherwise interfere with the actual use of the adjacent property. The language, however, of the license is clear and unambiguous.

The plaintiff in its briefs has cited no cases in the Federal courts which limit in any manner the power of the state to determine the uses of public highways.

27 There is no serious contention that the state acquired by this grant from the Secretary of the Interior anything but an easement, but if the grant conveyed the power of the state to use this right of way for highway purposes and the state determined that the use granted to the defendant was a valid and legal use of the public highway, the fact that the state has a mere easement and not a fee would be immaterial.

When the government accepted \$1,275 for the use of 4.46 acres of land, there is a strong inference, at least, that the state was paying to the government all that the land was actually worth and, therefore, the government was surrendering any right it had in the land, except in the event that the state ceased to use the land for highway purposes.

Notwithstanding payment of this substantial sum for the small amount of land acquired under the grant, it is the judgment of the court that the state could use the land only for highway purposes; and, in the event it failed to use the land for highway purposes, that the title would revert to the government.

In conclusion, therefore, the court is of the opinion that when the government granted to the State Highway Commission an easement to the right of way for the construction of a public highway, it did so under the Act of Congress of March 3, 1901, *supra*, "for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated,"; that the state had the power to determine the uses to which said highway would be subject; and that, since by the Laws of Oklahoma 1917, c. 220, *supra*, the defendant company has the right to construct its line of poles and wires along said highway with the consent of the Highway Commission, and since the Highway Commission has granted authority and permission to the defendant to erect said line, the plaintiff has no right to claim additional compensation for the use of said right of way as a highway for the purposes in question, nor to the injunctive relief sought against the defendant, requiring it to remove its line of poles and wires.

28 Judgment will be rendered for the defendant. Findings of fact, conclusions of law, and a form of judgment, consistent with this opinion, may be submitted within ten days from this date.

EDGAR S. VAUGHN,
United States District Judge.

Dated this 6th day of March 1941.

[File endorsement omitted.]

In United States District Court

Findings of fact and conclusions of law

Filed March 29, 1941

The court finds the facts to be in accord with the stipulation of the parties filed herein, and such stipulation is adopted as the findings of fact of this court.

Conclusions of law

I

That the nature and incidents of the grant or easement acquired by the State of Oklahoma from the United States for a public highway across the restricted Indian allotment in question, and the use and control of such highway, are to be determined by the laws of the State of Oklahoma.

II

That under the laws of the State of Oklahoma the construction, maintenance and operation of an electric transmission line for private and commercial purposes over, along and across public highways in the state is a proper highway use.

III

That the construction, maintenance and operation of an electric transmission line on public highways in the State of Oklahoma does not constitute an additional servitude for which the owners of abutting property are entitled to compensation; and such rule applies to the electric transmission line along the highway crossing the Indian allotment in question.

29

IV

The court finds all issues of law in favor of the defendant Oklahoma Gas and Electric Company and against the plaintiff, United States of America.

To all of which plaintiff excepts and exception is allowed.

EDGAR S. VANCE,
District Judge.

[File endorsement omitted.]

In United States District Court

Amended judgment

Filed April 16, 1941

This cause came regularly on to be heard, and the court being fully advised,

It is ordered, adjudged, and decreed, that Plaintiff, United States of America, take nothing and that its petition be and the same is hereby dismissed, and that each party hereto pay its respective costs.

Dated this 16 day of April 1941.

EDGAR S. VAUGHT,

*Judge of the United States District Court
for the Western District of Oklahoma.*

[File endorsement omitted.]

In United States District Court

Notice of appeal

Filed June 26, 1941

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the judgment entered in this action on March 29, 1941, and amended on April 16, 1941.

GEO. H. McELROY,

Assistant United States Attorney.

(Copy mailed to Rainey, Flynn, Green & Anderson June 26, 1941.)

[File endorsement omitted.]

30

In United States District Court

Order extending time

Filed July 28, 1941

It is this day ordered, for good cause shown, that the time in which the appellant, United States of America, may docket said cause and file a transcript of the record herein in the United

States Circuit Court of Appeals, be and the same is extended to September 24, 1941.

Dated this 28th day of July 1941.

EDGAR S. VAUGHT,
District Judge.

In United States District Court

Statement of points upon which appellant intends to rely on appeal

Filed July 17, 1941

Upon the appeal in the above entitled action, appellant intends to rely on the following points:

1. The permission of the Secretary of the Interior granted in accordance with Section 4 of the Act of March 3, 1901, c. 852, 31 Stat. 1058, 1084, to open and establish a public highway through Indian reservations or allotted lands does not confer the right to erect or maintain electric transmission lines and poles along the highway right of way.

2. The district court erred in entering judgment for defendant.

GEO. H. McELROY,
*Assistant United States Attorney,
Attorney for Appellant.*

Service of a copy of the Statement of Points Upon Which Appellant Intends to Rely on Appeal acknowledged this 17th day of July 1941.

R. M. RAINEY, JR.,
RAINEY, FLYNN, GREEN & ANDERSON,
Attorneys for Appellee.

[File endorsement omitted.]

31. In United States District Court

**Stipulation designating record on appeal*

Filed July 17, 1941

The parties in the above entitled cause hereby designate the following parts of the record which they consider necessary to this appeal:

1. Plaintiff's bill of complaint.
2. Defendant's answer.
3. Stipulation of Facts and Exhibit "I" attached thereto.
4. Opinion filed March 6, 1941.

5. Findings of Fact, Conclusions of Law, and Judgment entered March 29, 1941.
6. Amended judgment entered April 16, 1941.
7. Notice of Appeal filed June 26, 1941.
8. This Designation of Record on Appeal.
9. Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Geo. H. McElroy,

*Assistant United States Attorney,
Attorney for Appellant.*

Rainey, Flynn, Green & Anderson,

By R. M. Rainey, Jr.,

Attorneys for Appellee.

(File endorsement omitted.)

[Clerk's Certificate to foregoing transcript omitted in printing.]

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Order of submission

Fourth Day, January Term, Thursday, January 15th, A. D. 1942

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable ALFRED P. MURRAH, Circuit Judges

This cause came on to be heard and was argued by counsel, W. Robert Koerner, Esquire, appearing for appellant, Robert M. Rainey, Jr., Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

March 23, 1942

Before PHILLIPS, BRATTON, and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

We are asked to decide whether the appellee, Oklahoma Gas & Electric Company, herein called electric company, may by permission of the state of Oklahoma, but without permission, or consent, of the Secretary of the Interior, construct and maintain a rural electric line upon and along a state highway, constructed and maintained by the state, a portion of which traverses land allotted in severalty to a restricted Indian of the Kickapoo Tribe, the title to which land is held in trust by the Secretary of the Interior. The highway is constructed across and upon the said Indian land in pursuance of a permit, granted to the state of Oklahoma by the Secretary of the Interior under provisions of section 4 of the Act of March 3, 1901 (31 Stat. 1084, 25 U. S. C. A. 311),¹ which authorizes the Secretary of the Interior to grant a permit to the state to open and establish a highway across Indian land in accordance with the laws of the state, wherein situated. The electric company has not applied for, or secured a permit from the Secretary of the Interior to construct and maintain a rural electric line across the Indian land, or along and upon the right-of-way granted the State, and contends that it is not required to do so.

¹ Section 4 of the Act of March 3, 1901:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation."

The question for consideration is the meaning, purpose, and intent to be placed upon section 4 of the 1901 Act, *supra*, and more precisely, the meaning, purpose, and intent of the Congressional use of the words "for the opening and establishment of public highways in accordance with the laws of the State or Territory in which the lands are situated."

The facts, as stipulated and agreed, show that pursuant to the Act of March 3, 1893, chapter 203, article 4, 27 Stat. 557, the land in question was allotted in severalty to a restricted Kickapoo Indian. The title remained in the United States for the use and benefit of the allottee and was, at the time herein complained of, restricted land held in trust by the Secretary of the Interior for the use and benefit of the heirs of the original allottee. On July 9, 1926, in furtherance of its design to construct a system of highways, the State of Oklahoma, through its Highway Commission, applied to the Secretary of the Interior for permission to open and establish a public highway upon and across the land in question, in accordance with section 4 of the 1901 Act, *supra*. After such application, together with a map of definite location, had been filed with the Secretary of the Interior, the United States, through the Secretary of the Interior, filed a claim on behalf of the restricted Indians in the sum of \$1,275.00, as compensation for the establishment of the highway across and upon the allotment in question, which was by the State of Oklahoma paid to the Secretary of the Interior for the benefit of the restricted Indian heirs.

On January 20, 1928, the Assistant Secretary of the Interior approved the application by endorsing on the map of definite location the following: "Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058-1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim." The highway was opened and established. Thereafter, and on the 9th day of October 1936, the Highway Commission of the State of Oklahoma, acting under authority of the state laws, granted to the appellee, the electric company, a license and permit to erect, construct, and maintain a system of poles, and other electrical equipment, upon and along the said highway, which included that part of the restricted Indian allotment over which the Secretary of the Interior had granted permission for the establishment of the said highway. Thereafter, and in pursuance of the said license and permit granted by the said Highway Commission, the appellee in constructing its rural electric service line for the purpose of supplying electrical current to adjacent landowners, erected eight poles along and upon that portion of the highway which tra-

versed the allotted land in question, and on which there was installed the necessary power line.

On the theory that the electric company had no authority to install its power lines on that part of the highway, which traversed the restricted allotted land without first having obtained a permit from the Secretary of the Interior, the United States, through the Secretary of the Interior, brought this suit for declaratory adjudication of its asserted rights (28 U. S. C. A. 400); and for a mandatory injunction to remove the poles heretofore erected, and for money judgment in the sum of \$5.00 per pole, in the total amount of \$40.00.

The electric company contends that the authority granted to the state of Oklahoma by the Secretary of the Interior, under section 4 of the 1901 Act, *supra*, to open and establish a highway in accordance with the laws of the state, carried with it the authority of the state to grant the electric company a permit to construct its lines along and upon that portion of the highway which traversed the allotted land, and that the Secretary of the Interior had no power or authority to interfere with the same. The electric company's contention was sustained and relief denied by the trial court (37 F. Supp. 347).

In the first instance, the authority to open and establish a state highway across Indian land allotted in severalty to restricted Indians is derived from the federal statute, section 4 of the 1901 Act, and the extent to which that power may be exercised is subject to the limitations placed upon it by the Act itself. Its interpretation and construction is peculiarly within the competence of the federal courts, uninfluenced by any state notions of its meaning and purpose. State or local laws are applicable only to the extent to which they are made applicable by the federal statute, and the extent to which they are made applicable by the federal statute is also a federal question. *United States v. Oregon*, 295 U. S. 1, 28; *Colorado v. Toll*, 268 U. S. 228; *McKelvey v. United States*, 260 U. S. 353, 359; *Oklahoma v. Texas*, 258 U. S. 574, 595; and *Utah Power & Light Company v. United States*, 243 U. S. 389. The question, therefore, is to what extent were the state laws made applicable to the opening and establishment of the highway in question, and requires a consideration of the statutory scheme designed to subject lands under the exclusive control of the United States to the construction of highways, electric, telephone and telegraph lines necessary and essential to the needs of an advancing and progressive civilization.

The statute here in question is but a fragment of numerous acts of Congress, which have in various forms granted rights-of-way in the nature of easements across and upon public domain, national

parks, Indian, and other reservations, under the exclusive control of the National Government.³ It is sufficient to say that each grant, or authorization of a right-of-way upon public domain, or other reservation, has its proper setting in the scheme of national affairs as they relate to progress and development.

Congress authorized the Secretary of the Interior to permit the use of rights-of-way upon lands and national forests of the United States for the purpose of generating, or distributing electric power by the Act of May 14, 1896, 29 Stat. 120, 43 U. S. C. A. 957,⁴ but did not mention Indian lands or Indian reservations.

The Act of May 14, 1896, *supra*, was superseded by the Act of February 15, 1901, 31 Stat. 790, 43 U. S. C. A. 959. Under the provisions of this Act, the Secretary of the Interior is authorized and empowered under general regulations to be fixed by him, to permit the use of rights-of-way through public lands and reservations of the United States for electric plants, poles and lines for generation and distribution of electric power; for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes and tunnels or other water conduits. The Act provides the details incident to the granting of the permit and specifically provides that the permission given by the Secretary of the Interior can be revoked in his discretion, and does not confer any right, or easement, or interest in, to or over any reservation. The statute makes use of the word "reservation" without specifically mentioning Indian reservations or Indian lands. It is noticeably silent on Indian lands allotted in severalty.

The Act of February 15, 1901, *supra*, is contemporaneous with the Act of March 3, 1901, *supra* (of which section 4 is a part). The Act of March 3, 1901, commonly called sections 3 and 4, has been separately codified as sections 319, 357 and 311, 25 U. S. C. A., and in the Statutes at Large as sections 1083-1084. See *United States v. Minnesota*, 113 F. 2d 770. Each of these sections of the Act has direct relation to rights-of-way through Indian reservations, tribal lands, and lands allotted in severalty to any individual Indian under any law or treaty.

³ Act of July 26, 1890, c. 202, Section 8, 14 Stat. 253, 16 Stat. 2477, 43 U. S. C. A. 932; Act of July 3, 1894, c. 24, Section 6, 23 Stat. 104, 43 U. S. C. A. 933; Act of March 3, 1875, c. 152, Sections 1-6, 18 Stat. 492-3, 43 U. S. C. A. 934-8; Act of August 30, 1890, c. 437, Section 1, 26 Stat. 301, 43 U. S. C. A. 945; Act of March 3, 1901, c. 561, Section 18, 26 Stat. 1101, 43 U. S. C. A. 946, as amended March 4, 1917, c. 184, Section 1, 39 Stat. 1197; Act of March 11, 1899, c. 292, Section 2, 30 Stat. 404, 43 U. S. C. A. 951, as amended March 4, 1917, c. 184, Section 2, 39 Stat. 1197; Act of June 26, 1906, c. 3548, 34 Stat. 481, 43 U. S. C. A. 944.

⁴ "The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States, by any citizen or association of citizens of the United States for the purposes of generating, manufacturing, or distributing electric power."

The first paragraph of Section 3 (31 Stat. 1063, 25 U. S. C. A. 319) empowers the Secretary of the Interior to grant a right-of-way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business, through any lands held by an Indian tribe or nation in the Indian territory; through any lands reserved for an Indian agency or Indian school, "or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation." The Act further provides for the supervision by the Secretary of the Interior over the construction of the telephone lines; provides compensation to be paid therefor, and for a stipulated tax, but the Act does not authorize the Secretary of the Interior to revoke the easement. Neither does the Act mention electric plants, poles, or lines, and it has been held that this section does not authorize the installation or operation of electric lines, upon, across, or through the lands covered thereby. *Swendig v. Washington Water Power Company*, 235 U. S. 322.

The second paragraph of section 3 of the Act of March 3, 1901, *supra* (c. 832, Section 3, 31 Stat. 1064, 25 U. S. C. A. 357), specifically authorizes the condemnation of lands allotted in severalty to Indians for any public purpose in accordance with the laws of the State or Territory where located, as other lands, and provides that the money awarded as damages shall be paid to the allottees. *United States v. Minnesota*, *supra*. Section 4 of the same Act (31 Stat. 1064, 25 U. S. C. A. 311), is the statute under which the state of Oklahoma obtained permission from the Secretary of the Interior to open and establish the highway in question, over and across the land allotted in severalty to the restricted Indian, in accordance with the laws of the state of Oklahoma.

A consideration of the contemporaneous acts of February 15, 1901, *supra*, and of March 3, 1901, *supra*, when considered in their proper setting, leads to the conclusion that Congress intended to treat lands allotted in severalty to restricted Indians separately and apart, and in an entirely different manner, when granting rights-of-way for the construction of public utility lines and highways. Obviously, the power to condemn lands allotted in severalty to an individual Indian did not extend to Indian reservations, tribal lands, national forests, and other lands under the exclusive jurisdiction of the Federal government. As to these lands, only the power to permit the use of a right-of-way under varying forms and conditions was authorized. This view finds practical support in the common knowledge that lands allotted in severalty to Indians in Oklahoma are essentially a part of the

community in which they are situated, and subject to limited control by the state, or its political sub-divisions. The soil is tilled and improvements are constructed thereon, as other lands in the same vicinity. The value is enhanced by these public improvements, including the benefits of rural electrification. Land allotted in severalty is no longer part of the reservation, nor is it tribal land; the virtual fee is in the allottee with certain restrictions on the right of alienation. *United States v. Minnesota, supra.* Thus a plain and clear distinction is made between the granting of rights-of-way over and across reservations or tribal lands and those allotted in severalty to restricted Indians.

In the acquisition of the right-of-way for highway purposes, the state of Oklahoma had two remedies. First, it was authorized by federal statute (31 Stat. 1084, 25 U. S. C. A. 357) to condemn the right-of-way in accordance with the laws of the state of Oklahoma, thereby vesting in itself a permanent easement, the exact quality of which it is unnecessary here to determine, except it is certain that it would be authorized to permit the use of the same, for the purposes which the appellee seeks to subject it. Second, under section 4 (25 U. S. C. A. 311) the Secretary of the Interior was authorized, on application by the state, to grant a permit to open and establish the highway in accordance with the laws of the state. Under this section of the statute, it could acquire a permit to construct a highway across an Indian reservation, which it was not authorized to condemn under 25 U. S. C. A. 357. *United States v. Minnesota, supra.*

We deem it unnecessary to determine the exact quality of the estate, if any, acquired by the state of Oklahoma by virtue of its permit to construct the highway. It is enough to say that the highway was opened and established in accordance with the laws of the state of Oklahoma, and there is no provision for the revocation for the right-of-way acquired thereunder. There is no good reason for holding that the Secretary of the Interior intended to reserve any powers of supervision, or to impose any limitations upon the opening and establishment of the highway. Rather, the use of the words "in accordance with the laws of the state" negatives any intention of the Secretary to impose any restrictions upon its use beyond the duty of the Secretary to safeguard the use of the right-of-way for purposes not in accordance with the laws of the State.

It must be conceded that the use to which the appellee has subjected the right-of-way in question, under a license from the State Highway Commission, is not in derogation of state law, but is clearly within its intendment, and when measured by the laws of the state, such use does not constitute or impose an additional servitude upon the right-of-way, for which the owner of the

servient estate is entitled to additional compensation. *Oklmulgee Producers & Manufacturers Gas Company v. Franks*, 60 P. (2) 771, and *Nazworthy v. Illinois Oil Company*, 54 P. 2d 642.

In considering the question of whether such use of the highway constituted an additional burden or servitude which the Secretary of the Interior did not intend to grant, but intended to withhold or control, our decision is not measured or controlled by state notions of what constitutes an additional servitude or a detriment, or a right granted, or the extent thereof, if granted. Yet, we may well consider the reasoning of the decisions of the state of Oklahoma, which have held that a right-of-way acquired for the primary purpose of opening and establishing a highway may also be used, with the permission of the state opening and establishing the same, for the subsidiary purpose of constructing and maintaining telephone, telegraph, electric and pipe lines, without imposing an additional servitude upon the right-of-way. The authorities are collected in *Nazworthy v. Illinois Oil Company*, *supra*. The view is wholly compatible with what seems now to be the generally accepted view that a right-of-way acquired for the primary purpose of opening and establishing a highway may also be subjected to the use of public utility lines, with the permission of the State, without imposing an additional burden or servitude upon the servient estate. No case is cited by the Government, and we have found none inconsistent with the reasoning and conclusions of the Oklahoma authorities.

Under the provisions of 25 U. S. C. A. 357 (second paragraph of section 3, 31 Stat. 1084); the appellee could acquire a right-of-way for the construction and maintenance of its lines across any part of the land in question in accordance with the applicable laws of the state of Oklahoma relating to eminent domain. (Laws of 1917, Chapter 230, page 431, Section 3, Compiled Statutes of 1921 Section 6328, 27 O. S. A. 7.) Permission of the Secretary of the Interior is not requisite to the exercise of this power, *United States v. Minnesota*, *supra*, although he is an indispensable party to the proceedings. *Minnesota v. United States*, 305 U. S. 382. No statute is cited to us, or has come to our attention, which expressly authorizes the Secretary of the Interior to grant a permit or right-of-way, in the nature of an easement for the construction, maintenance, or operation of electric power lines across lands allotted in severalty to individual Indians; neither can we find any justification for the exercise of the ever present inherent power of the Secretary of the Interior to protect the rights of the Indian ward.

The Act of March 11, 1904, 33 Stat. 65, 25 U. S. C. A. 321, expressly authorizes the Secretary of the Interior to grant a permit

or right-of-way in the nature of an easement across Indian lands and reservations, including lands allotted in severalty to any individual Indian but the Act relates exclusively to the construction of pipe lines for the conveyance of oil and gas, and like the Act of February 15, 1901, *supra*, it does not concern itself with electric power lines.

The Act of March 4, 1911 (36 Stat. 125, 43 U. S. C. A. 961. See, also, 16 U. S. C. A. 5) expressly authorizes the head of the department having jurisdiction over public lands, national forests and reservations of the United States to grant an easement for a right-of-way over the said lands, enumerated, for the construction of electric poles and lines for the transmission and distribution of electric power and other purposes but, like the Act of February 15, 1901, *supra*, the provisions of this Act are not extended, and do not include lands allotted in severalty to individual Indians.

A consideration of all these statutes, together and apart, and the attendant circumstances which prompted their enactment leads us to the conclusion that the interest of the Secretary of the Interior in a right-of-way opened and established by the state, across Indian lands allotted in severalty, in accordance with the laws of the state, is confined to the protection of the Indian ward against the alienation of any part of his land without the payment of just compensation therefor, and to safeguard his substantial rights under the applicable law. Here, the state of Oklahoma has opened and established a highway across certain Indian land allotted in severalty to an individual Indian in accordance with the law of the state in pursuance of a permit from the Secretary of the Interior which the Secretary of the Interior was authorized to grant for that purpose, for which the state of Oklahoma paid the Secretary of the Interior the sum of \$1,275.00 for the benefit of the restricted Indians. The allotted land, as well as other adjacent land, is the beneficiary of the rural electric line established upon the right-of-way.

The state elected to open and establish a highway in accordance with its laws, by virtue of a permit granted for that purpose, and we can divine no congressional purpose to restrict the grant of the right-of-way beyond the requirements of the state law, in accordance with which the highway was opened and established.

It follows that the Secretary of the Interior has no express or implied authority to require the appellee to obtain a permit for the construction and maintenance of its rural electric lines along, and upon the right-of-way granted to the state for the primary purpose of opening and establishing a highway in accordance with its laws.

The judgment is affirmed.

Judgment

First Day, March Term, Monday, March 23rd, A. D. 1942

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON,
and Honorable ALFRED P. MURRAH, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On April 28, 1942, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

Clerk's certificate

UNITED STATES CIRCUIT COURT OF APPEALS, Tenth Circuit.

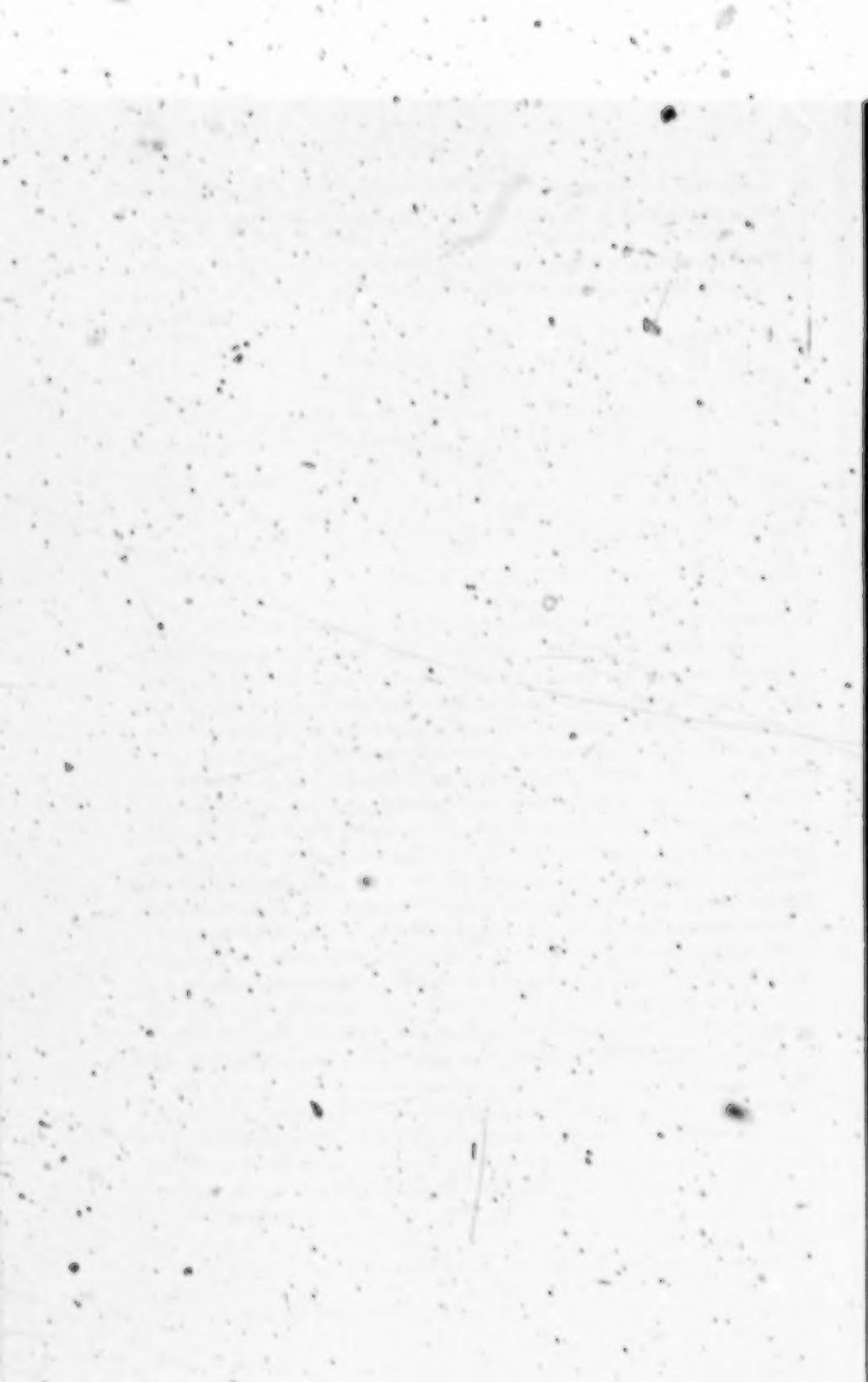
I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2390, wherein United States of America was appellant, and Oklahoma Gas & Electric Company, a corporation, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 27th day of May A. D. 1942.

[SEAL]

ROBERT B. CARTWRIGHT,
*Clerk of the United States Circuit Court of Appeals,
Tenth Circuit.*

By GEORGE A. PEASE,
Deputy Clerk.



40 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 46665. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 171. The United States of America, Petitioner vs. Oklahoma Gas & Electric Company. Petition for a writ of certiorari and exhibit thereto. Filed June 23, 1942. Term No. 171 O. T. 1942.